Supreme Court, U.S.
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No. 93-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM F. GLOVER,
Petitioner,

v.

MCDONNELL DOUGLAS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS C. WALSH
(Counsel of Record)
MICHAEL P. BURKE
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, Missouri 63102-2750
(314) 259-2000

Attorneys for Respondent

BRYAN CAVE
Of Counsel

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

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STATEMENT OF THE CASE

Introduction

Petitioner's Statement of the Case is misleading in a number of important respects and is notable for its lack of citations to the record. Accordingly, we will set forth this factual recitation to place the Petition in proper perspective.

Respondent McDonnell Douglas Corporation is a major defense contractor.[1] Beginning in 1986 and continuing at least

[1] Pursuant to Sup. Ct. Rule 29.1, respondent states that it has no parent corporation. It has only one subsidiary that is not wholly-owned: Finnair American Trade, Inc., of which the minority shareholder, Finnair OY, owns 20%.

through the trial of this case, adverse business and financial conditions caused a devastating series of reductions in force at McDonnell and its component companies. For example, from 1986-91, McDonnell Douglas Astronautics Company ("MDAC") cut more than 1,500 jobs (Tr. 2:26, 30, 46-47). Another division, McDonnell Aircraft Company ("MCAIR"), reduced its work force by 9,000 jobs in 1990-91 (Tr. 2:46-47). During this difficult period, petitioner was only one of thousands of employees laid off. He sued, alleging age discrimination under the Age Discrimination in Employment Act ("ADEA"), as well as under the Missouri Human Rights Act. A jury agreed and awarded him $30,000 for back pay, $30,000 as liquidated damages for a "willful" violation of the ADEA, and $100,000 for emotional distress and $100,000 for punitive damages (the latter two awards being under state law).

The Eighth Circuit, remarking that this was "an extremely close case" on liability (Pet. Apdx. A-9) and that petitioner "did (barely) present sufficient evidence to sustain the jury's verdict" (*id.* at A-14), affirmed the back pay award but reversed the balance of the district court's judgment. Petitioner does not seek plenary review but asks this Court to summarily vacate the Court of Appeals' ruling on the "willfulness" issue and the state law punitive damage claim and to remand for further consideration in light of *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993).

The 1987 Consolidation

Petitioner began work at McDonnell in 1967 and held similar accounting-related clerical jobs throughout his entire employment career. Although he received a college degree (in business, not accounting) in 1979, he had *never* earned a promotion in his 21 years of employment with McDonnell (Tr. 1: 91, 100; 3:60). In 1987 petitioner (then age 58) was employed at MDAC as an accounts payable processor, the same entry-level clerical position he had held since 1981 (Tr. 1:94). He had not received a

merit wage increase in more than three years (Tr. 1:60). Contrary to petitioner's assertions (Pet. 3), there is no evidence that his job performance was "competent" or that his evaluations were "positive." On the contrary, his appraisals were decidedly negative (Apdx. 64-69), and one of his direct supervisors considered petitioner to be one of the "weaker performers" in the MDAC accounting department (Tr. 2:210-11, 218).

In late 1987, in an effort to remain viable in a declining segment of the defense market, MDAC and certain other McDonnell business units were reorganized and consolidated, which resulted in the elimination of approximately 240 job positions. However, only 19 employees eventually had to be selected for involuntary layoff, and ten of those found jobs elsewhere within other McDonnell components. Of the ten, eight were over 40, four of whom were over 50 and one of whom was 64 (Tr. 2:41-42; Deft. Ex. U). Petitioner's department of more than 100 employees lost three to the involuntary layoff: petitioner (a 20-year employee); a 1-1/2 year employee, age 33; and a nine-year employee, age 59 (Tr. 2:133-36; Deft. Ex. G).

The 1987 consolidation was announced to employees in late October 1987. They were advised that, although the company expected normal attrition to accomplish some of the required staffing reductions, a Voluntary Severance Program was also being established in order to meet the overall reduction goals. Petitioner was eligible for the VSP Program, but did not avail himself of it (Tr. 2:36-37, 66). Unfortunately, the VSP Program did not meet the established goal, so involuntary layoffs became necessary. Hence, on January 15, 1988, Joseph Barbeau, the head of the accounting department in the consolidated organization, was instructed by his superior to select three employees from his department for involuntary layoff (Tr. 2:68).

The Layoff Selection Process

Barbeau set as his objective the retention of those employees who would best be able to handle the work of the consolidated

accounting department (Tr. 2:69-70). In particular, he wanted employees who would be adaptable, flexible and able to accomplish a variety of tasks (Tr. 2:69-70). He determined that the place to start was the so-called "totem pole" for 1987 (Tr. 2:70).

The "totem pole" was an employee-evaluation technique regularly used at McDonnell. The management of each department listed all the employees in the department according to the relative value of the contribution made to the department for the year. In other words, the employees who made the greatest contribution to the work of the department were listed at the top of the totem pole, whereas the weakest contributors were listed at the bottom.[2] Consequently, Barbeau concluded that the most likely candidates for layoff would be those employees listed toward the bottom of the totem pole (Tr. 2:70-72). Of the 42 salaried employees in the MDAC accounting department in 1987, plaintiff ranked *dead last* on the totem pole (Tr. 2:100; Deft. Ex. C).

Barbeau's task regarding the layoff was complicated by the consolidation of the other business units into MDAC, which produced a consolidated accounting department comprising employees from three different business units, each of which had separate totem poles for 1987. Consequently, Barbeau had to gather various totem poles for 1987 to cover all his then-current employees. From these rankings he selected approximately six names from the bottom of each one as his preliminary list of candidates (Tr. 2:73-74; Deft. Exs. C and D). For this initial group of employees he also obtained totem pole rankings for 1986 and 1985 (Tr. 2:84-85, 87-88; Deft. Exs. C and D). He then gathered information regarding their pay raises for 1985, 1986 and 1987, reasoning that a low pay raise, along with a low totem pole ranking, would reflect management's overall evaluation

[2]This meant, for example, that relatively new employees would generally rank toward the bottom of the totem pole simply because they had not yet had time to develop into more significant contributors (Tr. 2:187).

that the employee was a weak performer (Tr. 2:100-03; Deft. Ex. E). Barbeau also sought out views from other department managers concerning the performance of the employees who might be selected for layoff.[3]

Barbeau next created a consolidated list of all the candidates for layoff within the accounting department, and listed them in a preliminary ranking according to his judgment about their ability to contribute to the future work of the department (Tr. 2:105). Petitioner stood out on this list, based primarily on his pattern of low totem pole rankings and zero raises (Tr. 2:106). Next, Barbeau added information to the list as to each employee's age, years of service and absenteeism record (Tr. 2:107-08, 113-14; Deft. Ex. F). Then Barbeau met with his immediate staff to discuss the employees on his preliminary list and to discuss his tentative rankings. His handwritten notes of that meeting reflect the unanimous view that petitioner was the *most* appropriate candidate for layoff (Tr. 2: 117-23; Pl. Ex. 66).

The Review Committee Process

Barbeau then met with MDAC Human Resources and Law Department representatives as part of the Review Committee process set up by MDAC (Tr. 2:127). The purpose of the Review Committee was to provide another level of review to ensure that those employees chosen for layoff had been appropriately selected on a "pure business basis and . . . not in violation of any company policy or law" (Tr. 2:39). Barbeau met twice with Human Resources and Law Department representatives to this end.

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[3] Barbeau testified that, during this process, one of the managers he contacted told him that one of the employees on Barbeau's preliminary list (Laura Pund) was "young" and had "more potential" than her performance indicated. Barbeau made a note to that effect (Tr. 2:89-90; Deft. Ex. D). He also recorded a similar notation regarding another employee (Carol Carr) who was a "minority" and had a "personal problem" which apparently was the cause of her troublesome absenteeism (Tr. 2:88-89, 125-26; Deft. Ex. D).

In his first meeting, Barbeau was given general guidance regarding appropriate factors to be considered in making his selections, which included the employee's history of raises, performance evaluations, recent discipline, attendance problems and, *if everything else were equal*, length of service (Tr. 2:127-28, 130).[4] Barbeau reviewed his list to confirm that he had considered the appropriate factors in making his evaluation (Tr. 2:130-31). Finally, a second meeting was held with the Review Committee at which Barbeau presented information regarding the individual employees on his list of candidates for layoff, and each was discussed in turn. Although some changes were made as a result of this meeting, petitioner was one of the three employees finally selected for layoff out of Barbeau's accounting department (Tr. 2:131-36).[5]

The Search for Another Job

Petitioner was advised on January 22, 1988, that he would be laid off effective February 5, 1988 (Tr. 1:64-65, 67). He was also told to use all his remaining time to find a new job elsewhere within McDonnell if at all possible. To aid him in this effort, he was referred to the MDAC Career Resource Center to obtain information regarding available job openings listed in the Company's internal job posting system (Tr. 2:139-40).

As part of the overall reduction-in-force procedure, the MDAC Career Resource Center sent the employment folders of all 19 MDAC employees selected for layoff to the related areas within MCAIR (and other component companies). The purpose was to advise those departments that these particular MDAC employees were available and to see if their credentials sparked any

[4] This uncontroverted evidence belies petitioner's assertion (Pet. 3) that years of service was one of the principal criteria used in the layoff process.

[5] Component-wide, a total of 19 MDAC employees were identified as layoff candidates; ten of them successfully transferred to MCAIR, and nine were actually laid off in this particular reduction-in-force (Tr. 2:41-42; Deft. Ex. U).

interest (Tr. 2:40-41).[6] As part of this process, James Cleeton, Director of Accounting for MCAIR, received petitioner's folder and reviewed it. Cleeton observed that petitioner's resume was unimpressive, especially given his total lack of advancement despite many years with the company. Consequently, Cleeton had no interest in pursuing petitioner as a possible employee for MCAIR (Tr. 3:35-36).

After Cleeton had reviewed petitioner's personnel folder, he received an unsolicited telephone call from petitioner, who inquired about possible positions with the MCAIR accounting department (Tr. 3:38). Petitioner claimed that Cleeton told him over the telephone that "your age is against you" and that he (Cleeton) had been instructed to hire only younger persons with new and fresh ideas (Tr. 1:71). Cleeton denied making these statements (Tr. 3:41); but regardless of what was actually said during this telephone conversation, it is undisputed that Cleeton was not in any way involved in making a decision or even a recommendation with respect to any applicant for a job opening at MCAIR at that time (Tr. 3:43-44).

The person with that responsibility was Robert Ford, who testified that he reviewed petitioner's application materials but rejected him from consideration primarily because he lacked an accounting degree — a requirement listed for the job (Tr. 3:60). Additionally, Ford saw that petitioner's record of job stagnation indicated a lack of performance potential; and, surprisingly, petitioner's application materials stated that his career goal was to become a "Buyer," a position completely unrelated to the needs of the MCAIR accounting department (Tr. 3:60). Both Ford and Cleeton separately testified that they never discussed with each other petitioner's inquiry to Cleeton or his application for a job in the MCAIR accounting department (Tr. 3:43-44, 60-61).

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[6] Of the ten who successfully obtained new positions at MCAIR, eight were over 40 years old and four were over 50 (one being 64) (Tr. 2:41-42; Deft. Ex. U).

The Court of Appeals' Opinion

The Eighth Circuit, in an opinion by Senior Circuit Judge Floyd R. Gibson, ruled that petitioner had made a razor-thin submissible case on liability under the ADEA and upheld the jury's award of $30,000 in back pay. With regard to the "willfulness" issue, the court cited and followed *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128-29 (1985). After reviewing the entire record, the court analyzed the evidence in light of the *Thurston* standard:

> "There is simply no evidence that McDonnell Douglas recklessly disregarded the possibility of an ADEA violation, and there is no contention that the company knew its actions were discriminatory. Consequently, there was no evidence upon which the jury's finding of willfulness can rest, so we reverse the jury's finding and vacate the corresponding award" (Pet. Apdx. A-14).

The Eighth Circuit was aware that this Court had granted certiorari in *Hazen Paper Co. v. Biggins* to consider the continued viability of *Thurston*. Having analyzed the record as required by *Thurston*, the Court observed that ". . . if *Thurston* continues to apply, the law — and our decision — will be unchanged." *Id.* n.2.

With regard to the state-law punitive damage award, the Eighth Circuit reversed because there was no evidence of conduct that was "outrageous because of [the employer's] evil motive or reckless indifference to the rights of others," as required by the Missouri Supreme Court in its controlling opinion in *Burnett v. Griffith*, 769 S.W.2d 780, 789 (Mo. banc 1989).

A petition for rehearing and a suggestion for rehearing en banc were denied, one judge dissenting.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner, as noted, does not seek plenary review. Instead, in a single but compound Question Presented, he suggests summary reversal and a remand to the Eighth Circuit to require that court (a) to reconsider the sufficiency of the evidence of "willfulness" which it has already analyzed under the proper standard, and (b) to revisit a question of state law regarding the quantum of evidence required to sustain an award of punitive damages. The Court of Appeals properly analyzed the federal law issue under the then-existing rule of *Thurston*, which was reaffirmed in *Biggins*. The state-law punitive damage question presents nothing to warrant the exercise of this Court's discretionary certiorari jurisdiction. Accordingly, the petition should be denied.

I. THE COURT OF APPEALS ANALYZED THE SUFFICIENCY OF EVIDENCE OF "WILLFULNESS" UNDER THE STANDARD OF *TRANS WORLD AIRLINES v. THURSTON*, WHICH WAS REAFFIRMED BY THIS COURT IN *HAZEN PAPER CO. v. BIGGINS*.

In light of the fact that petitioner was the least competent performer in his department and was rated last on the objective "totem pole," he was an obvious choice for layoff during a reduction in force. His record and the employer's scrupulous attempts to satisfy all legal requirements prompted the Court of Appeals to observe that the evidence of age discrimination was barely sufficient to justify submitting the case to the jury. The court referred to this as "a close case" (Pet. Apdx. A-6), and ". . . an extremely close case" (*id.* A-9), and noted that "Glover did (barely) present sufficient evidence to sustain the jury's verdict" (*id.* A-14).[7]

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[7] Indeed, the EEOC had previously rejected petitioner's charge of discrimination (Tr. 3:26-30).

Thus, although the court narrowly upheld the finding of liability and the award of back pay, it rejected the jury's finding of "willfulness" and the ensuing award of double damages, noting the utter absence of any evidence of willful wrongdoing. Indeed, the factual pattern here was very similar to that in *Thurston*, in which this Court reversed a willfulness finding. There, as here, the employer sought advice from the corporate legal department as to the guidelines to be employed when making the final decision. In addition, in the instant case, the employer utilized two layers of review and consulted not only with the legal department but also with the Human Resources department.

The Court of Appeals cited *Thurston* and then properly applied the *Thurston* test:

> "There is simply no evidence that McDonnell Douglas recklessly disregarded the possibility of an ADEA violation and there is no contention that the company knew its actions were discriminatory. Consequently there was no evidence upon which the jury's finding of willfulness can rest, so we reverse the jury's finding and vacate the corresponding award" (Pet. Apdx. A-14).

Petitioner argues that the Court of Appeals should now be required to reconsider this case because of the intervening decision in *Biggins*. Such an exercise would be an empty ritual. *Biggins* did not withdraw or depart from *Thurston* but in fact reinforced the same *Thurston* test that the Eighth Circuit has already applied to the facts of this case. In *Biggins*, the Court said:

> "We therefore reaffirm that the *Thurston* definition of 'willful' — that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute — applies to all disparate treatment cases under the ADEA." 113 S. Ct. at 1710.

The Eighth Circuit was well aware that certiorari had been granted in *Biggins* and, in its opinion in this case, foresaw that *Biggins* might be decided as it eventually was. In footnote two of his opinion, Judge Gibson anticipated petitioner's current argument:

> "We believe the Court [in *Biggins*] will do one of two things (and we make no prediction as to which): either continue to apply *Thurston* to individual plaintiffs or impose a higher standard of willfulness for individual plaintiffs; we do not believe the Court will lower the standard already enunciated in *Thurston*. Regardless of the course of action the Court chooses, our decision today will be unaffected; if *Thurston* continues to apply, the law — and our decision — will be unchanged. If a higher standard is imposed, the evidence in this case will be insufficient to meet it, inasmuch as Glover has not even met the *Thurston* standard" (Pet. Apdx. A-14 n.2).

Nevertheless, petitioner argues that the Court of Appeals should be required to take a "fresh look at the evidence" (Pet. 12). Implicit in this argument is the contention, rejected in both *Thurston* and *Biggins*, that a finding of willfulness is mandated automatically in any case of proven discrimination under the ADEA. This linchpin of petitioner's position disregards the plain language of *Biggins*:

> "It is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA." 113 S. Ct. at 1709.

The Eighth Circuit properly concluded that what is missing here is additional evidence of a knowing or reckless violation of the ADEA. Although petitioner recites his own slanted version of the facts, in the argument portion of his petition he never indicates which of those facts supposedly show "willfulness" and thus require further consideration by the Eighth Circuit.

Presumably the fact that Barbeau consulted the legal department is deemed by petitioner to be of significance (Pet. 5). But *Thurston* itself recognized that such consultation evidences good faith and carefulness, not recklessness. It would be an extreme irony if an employer's attempt to comply with the law could be used against him as evidence of willful disregard of the law.

Petitioner does not even pretend that this case contains an issue of nationwide importance or that it is otherwise worthy of this Court's time. There is no reason why this Court should intervene in this proceeding at this stage for the mere purpose of requiring the Eighth Circuit to redo what it has already done. The court below analyzed the evidence under the proper standard, and petitioner cannot point to any evidence that mandates a different result as a matter of law. Hence, a remand would be a waste of time.

Petitioner also suggests that the Eighth Circuit might want to reconsider its decision in this case in light of its own later en banc opinion in *Brown v. Stites Concrete, Inc.* (Pet. 10-11). Even if this Court were inclined to grant certiorari for the purpose of promoting intra-circuit harmony, this case does not fall into that category. *Brown* was argued en banc on January 11, 1993, and was under active consideration by the whole Eighth Circuit during the entire period that petitioner's Petition for Rehearing and Rehearing En Banc was pending. If that court thought that the panel opinion in this case was contrary to the opinion then being written and circulated in *Brown*, it would have deferred ruling on the Petition for Rehearing and remanded this case to the panel for re-examination in light of *Brown* once *Brown* was decided. Instead, the Petition for Rehearing was denied by a vote of 10-1.

To grant the relief requested by petitioner would be to require the Court of Appeals to retrace the same steps it has already taken

down the same path with the same map. Judicial resources can be better deployed. Certiorari should be denied.

II. THE PUNITIVE DAMAGE ISSUE PRESENTS A QUESTION OF STATE LAW.

The single "Question Presented for Review" by petitioner (Pet. i) embodies not only the federal sufficiency-of-the-evidence issue but also a quite distinct state-law question concerning punitive damages. Tacitly recognizing that this Court does not sit to oversee interpretations of state law, petitioner suggests that the Court of Appeals' view of the sufficiency of the punitive damage evidence was erroneously infected by its supposedly flawed vision of federal law. The suggestion is fanciful. But even if it were accurate, certiorari would be inappropriate because (a) at bottom the punitive damage issue is a state-law matter and (b) the Missouri Supreme Court indeed has held that an award of punitive damages requires a showing of greater culpability than is required for mere liability. The Eighth Circuit correctly cited *Burnett v. Griffith*, 769 S.W.2d 780, 789 (Mo. banc 1989), as requiring proof for punitive damages that the defendant's conduct is "outrageous because of his evil motive or his reckless indifference to the rights of others."

No amount of creative advocacy can fit this case into a punitive damages mold. Petitioner was the least qualified of all the persons in the accounting department and had never received a promotion in 21 years. To suggest that his layoff was "outrageous" during a time when respondent was forced by economic conditions to cut almost 10,000 jobs is, itself, outrageous.

There is no reason to require the Court of Appeals to revisit the punitive damages issue. At any rate, this aspect of the Question Presented involves a pure issue of state law.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

THOMAS C. WALSH
(Counsel of Record)
MICHAEL P. BURKE
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, Missouri 63102-2750
314-259-2000

Attorneys for Respondent

BRYAN CAVE
Of Counsel

August 1993